UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAYMOND MALGRA, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security Administration, Defendant.	Case No. ED CV 11-0724-SP **MEMORANDUM OPINION AND ORDER**

I.

INTRODUCTION

On May 16, 2011, plaintiff Raymond Malgra filed a complaint against defendant Michael J. Astrue, seeking a review of a denial of Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties' briefing is now complete, and the court deems the matter suitable for adjudication without oral argument.

Two issues are presented for decision here: (1) whether the Administrative Law Judge ("ALJ") properly determined at step four that plaintiff is capable of

performing his past relevant work; and (2) whether the ALJ properly determined at step five that plaintiff is capable of performing other work in the national economy. Pl.'s Mem. at 3-4, 4-5; Def.'s Mem. at 2-5, 5-7.

Having carefully studied, inter alia, the parties' written submissions and the Administrative Record ("AR"), the court concludes that, as detailed herein, there is substantial evidence in the record, taken as whole, to support the ALJ's decision. First, the ALJ properly determined at step four that plaintiff is capable of performing his past relevant work. And second, although the ALJ erred at step five in his alternative finding that plaintiff is capable of performing other work that exists in the national economy, such error was harmless in light of the ALJ's proper step four determination. The court therefore affirms the Commissioner's decision denying benefits.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, who was twenty-one years old on the date of his July 14, 2009 administrative hearing, has an eleventh-grade education. *See* AR at 18, 26, 108, 111. His only past relevant work is as a fast-foods worker. *Id.* at 46, 121-22.

On November 16, 2007, plaintiff applied for DIB and SSI, alleging that he has been disabled since April 15, 2007 due to neurofibromatosis, long QT syndrome, and seizures. *See* AR at 108-10, 111-14, 120. Plaintiff's applications were denied initially and upon reconsideration, after which he filed a request for a hearing. *Id.* at 50, 51, 52, 53, 54-58, 59, 60-65, 66.

On July 14, 2009, plaintiff, represented by counsel, appeared and testified at a hearing before the ALJ. AR at 20-35, 38, 46. The ALJ also heard testimony from David Rinehart, a vocational expert ("VE"). *Id.* at 45-48. On November 24, 2009, the ALJ denied plaintiff's request for benefits. *Id.* at 9-17.

Applying the well-known five-step sequential evaluation process, the ALJ found, at step one, that plaintiff has not engaged in substantial gainful activity since

his alleged disability onset date. AR at 11.

At step two, the ALJ found that plaintiff suffers from severe impairments consisting of a seizure disorder and a long QT interval.[1/] AR at 11.

At step three, the ALJ determined the evidence does not demonstrate that plaintiff's impairments, either individually or in combination, meet or medically equal the severity of any listing set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR at 13.

The ALJ then assessed plaintiff's residual functional capacity ("RFC")[2/] and determined that he can perform "simple repetitive tasks but would lose focus for a few minutes at a time at a frequency of once or twice a week." AR at 13 (emphasis omitted). The ALJ further found the following limitations: plaintiff cannot drive, climb, or balance; plaintiff cannot work at unprotected heights, around hazardous machinery, or with power tools; and that it is anticipated plaintiff would miss work one to two days per month. *Id.*

The ALJ found, at step four, that plaintiff is capable of performing past

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[1/] Long QT syndrome is the:

> prolongation of the Q-T interval combined with torsades de pointes, one of the most common types of ion channelopathy. Acquired forms are usually due to a metabolic or cardiac abnormality or to drug administration. Congenital forms result from a variety of mutations in genes coding for channel subunits and are usually noted early in life. The condition may lead to serious arrhythmia and sudden cardiac death (sudden arrhythmia death syndrome).

Dorland's Illustrated Medical Dictionary 1837 (32nd ed. 2012).

[2/] Residual functional capacity is what a claimant can still do despite existing exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n.2 (9th Cir. 2007).

relevant work as a fast-foods worker (Dictionary of Occupational Titles ("DOT") No. 311.472-010). AR at 15.

In the alternative, based upon plaintiff's vocational factors and RFC, the ALJ found that "there are other jobs existing in the national economy that [plaintiff] is also able to perform." AR at 16. The ALJ therefore concluded that plaintiff was not suffering from a disability as defined by the Social Security Act. *Id.* at 9, 17.

Plaintiff filed a timely request for review of the ALJ's decision, which was denied by the Appeals Council. AR at 1-3, 5. The ALJ's decision stands as the final decision of the Commissioner.

III.

STANDARD OF REVIEW

This court is empowered to review decisions by the Commissioner to deny benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security Administration must be upheld if they are free of legal error and supported by substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001). But if the court determines that the ALJ's findings are based on legal error or are not supported by substantial evidence in the record, the court may reject the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001).

"Substantial evidence is more than a mere scintilla, but less than a preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such "relevant evidence which a reasonable person might accept as adequate to support a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d at 459. To determine whether substantial evidence supports the ALJ's finding, the reviewing court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the ALJ's conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "'cannot be affirmed simply by isolating a specific quantum of supporting evidence.'" *Aukland*, 257 F.3d

at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the evidence can reasonably support either affirming or reversing the ALJ's decision, the reviewing court "'may not substitute its judgment for that of the ALJ.'" *Id.* (quoting *Matney ex rel. Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

IV.

DISCUSSION

A. The ALJ Did Not Err at Step Four

Plaintiff argues that "the ALJ failed to properly consider [plaintiff's] ability to perform his past relevant work." Pl.'s Mem. at 3. Specifically, plaintiff does not challenge the ALJ's finding regarding his RFC, but instead argues that his past relevant work requires him to work around "dangerous machinery," which is precluded by his RFC. *Id.* at 3-4. The court disagrees. The ALJ, in assessing plaintiff's RFC, explicitly precluded plaintiff from working around "hazardous machinery," not "dangerous machinery." *See* AR at 13. Moreover, because the fast-foods worker position does not require work around any "hazardous machinery," there is no inconsistency between the demands of plaintiff's past job as a fast-foods worker and plaintiff's RFC. *See* DOT No. 311.472-010.

"At step four of the sequential analysis, the claimant has the burden to prove that he cannot perform his prior relevant work 'either as actually performed or as generally performed in the national economy.'" *Carmickle v. Comm'r*, 533 F.3d 1155, 1166 (9th Cir. 2008) (citation omitted). "Although the burden of proof lies with the claimant at step four, the ALJ still has a duty to make the requisite factual findings to support his conclusion." *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). The ALJ must make specific findings as to: (1) "the claimant's residual functional capacity"; (2) "the physical and mental demands of the past relevant work"; and (3) "the relation of the residual functional capacity to the past work."

Id. at 845 (citing Social Security Ruling ("SSR") 82-62).[3/] But the ALJ is not required to make "explicit findings at step four regarding a claimant's past relevant work both as generally performed *and* as actually performed." *Pinto*, 249 F.3d at 845.

Here, the ALJ properly made the requisite specific findings to support his conclusion that plaintiff is able to perform his past relevant work.[4/] As noted above, the ALJ assessed plaintiff's RFC and found that plaintiff could perform "simple repetitive tasks," but could not, inter alia, work around hazardous machinery. *See* AR at 13. The ALJ then, with the help of the VE, made specific findings as to the relation of plaintiff's RFC to the demands of his past relevant work and determined plaintiff is capable of performing his past work as fast-foods worker. *Id.* at 15, 45-48.

Plaintiff contends that because the DOT states that "[t]he fast food worker '[m]akes and serve hot beverage using automatic water heater or coffee pot . . . [and] [m]ay cook or apportion French fries," the fast-foods worker job requires use of "dangerous machinery," which is precluded by plaintiff's RFC. Pl.'s Mem. at 3-

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[3/] "The Commissioner issues Social Security Rulings to clarify the Act's implementing regulations and the agency's policies. SSRs are binding on all components of the SSA. SSRs do not have the force of law. However, because they represent the Commissioner's interpretation of the agency's regulations, we give them some deference. We will not defer to SSRs if they are inconsistent with the statute or regulations." *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th Cir. 2001) (internal citations omitted).

[4/] Plaintiff does not contend there's a difference between the demands of his past relevant work as generally performed and actually performed. Having reviewed the DOT's description of plaintiff's past relevant work and plaintiff's description of how he actually performed his past relevant work, the court finds that there is no significant difference between the two and will therefore discuss the demands of plaintiff's past relevant job as described in the DOT. *Compare* DOT No. 311.472-010 *with* AR at 122.

4. But plaintiff is incorrect in his assertion that the ALJ found plaintiff is precluded from working around dangerous equipment. Instead, the ALJ found plaintiff "could not work . . . around hazardous machinery." AR at 13. There is a significant distinction between "dangerous" and "hazardous."

"The 'hazards' defined in the [DOT] . . . include moving mechanical parts of equipment, tools, or machinery; electrical shock; working in high, exposed places; exposure to radiation; working with explosives; and exposure to toxic, caustic chemicals." SSR 96-9p, 1996 WL 374185, at *9. Indeed, consistent with SSR 96-9p, the ALJ was apparently focusing on the "moving" type of hazardous machinery when he found plaintiff "could not work . . . around hazardous machinery." *See* AR at 45 (in his hypothetical to the VE, the ALJ stated that the individual should not, inter alia, "work with moving machinery"). Because the machineries (automatic water heaters, coffee pots, and french fry vats) a fast-foods worker may be exposed to do not involve moving mechanical parts, electrical shock, high exposed places, radiation, explosives, or toxic caustic chemicals, they are not "hazardous" machineries as defined by the DOT. Aside from these non-hazardous machineries, the fast-foods worker position does not require the individual to work around any machineries that are "hazardous." *See* DOT No. 311.472-010 ("Moving Mech. Parts: Not Present"; "Electric Shock: Not Present"; "High Exposed Places: Not Present"; "Radiation: Not Present"; "Explosives: Not Present"; and "Toxic Caustic Chem.: Not Present").

Accordingly, there was no inconsistency between the VE's testimony and the DOT that the ALJ failed to question or resolve. And because plaintiff's past relevant work does not include work-related activities precluded by his RFC, the ALJ did not err at step four in finding plaintiff capable of performing his past relevant work as a fast-foods worker.

B. <u>The ALJ Committed Harmless Error at Step Five</u>

Plaintiff argues that the ALJ erred at step five because the demands of the job

the ALJ found plaintiff could perform (hand packager (DOT No. 920.587-018)) are inconsistent with plaintiff's RFC, and the ALJ failed to explain how he resolved the conflict. Pl.'s Mem. at 4-5. Specifically, plaintiff contends that the hand packager job involves occasional balancing (up to one-third of the time), which plaintiff is precluded from performing. *Id.* at 5. In addition, "[t]he job may include starting, stopping, and regulating the speed of a conveyor belt," which plaintiff maintains is a hazardous machinery that he is precluded from operating. *Id.* For the reasons discussed below, the court agrees that plaintiff's ability to balance is inconsistent with the hand packager's job requirement, but the court disagrees that a conveyor belt constitutes a "hazardous" machinery that plaintiff is precluded from operating. Although the ALJ erred at step five, such error was harmless given the ALJ's proper step four finding.

At step five, the burden shifts to the Commissioner to show that the claimant retains the ability to perform other gainful activity. *Lounsburry v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a claimant is not disabled at step five, the Commissioner must provide evidence demonstrating that other work exists in significant numbers in the national economy that the claimant can perform, given his or her age, education, work experience, and RFC. 20 C.F.R. §§ 404.1512(g), 416.912(g).

ALJs routinely rely on the DOT "in evaluating whether the claimant is able to perform other work in the national economy." *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir. 1990) (citations omitted); *see also* 20 C.F.R. §§ 404.1566(d)(1) (DOT is source of reliable job information), 416.966(d)(1) (same). The DOT is the rebuttable presumptive authority on job classifications. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995). An ALJ may not rely on a VE's testimony regarding the requirements of a particular job without first inquiring whether the testimony conflicts with the DOT, and if so, the reasons therefor. *Massachi*, 486 F.3d at 1152-53 (citing SSR 00-4p). But failure to so inquire can be deemed harmless error

where there is no apparent conflict or the VE provides sufficient support to justify deviation from the DOT. *Id.* at 1154 n.19. In order for an ALJ to accept a VE's testimony that contradicts the DOT, the record must contain "persuasive evidence to support the deviation." *Id.* at 1153 (citing *Johnson*, 60 F.3d at 1435). Evidence sufficient to permit such a deviation may be either specific findings of fact regarding the claimant's residual functionality, or inferences drawn from the context of the expert's testimony. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997) (citations omitted).

Here, the ALJ improperly relied on the VE's testimony regarding the requirements of the hand packager job. *See* AR at 46 (VE testified that plaintiff could perform work as a hand packager, DOT No. 920.587-018). The VE's testimony deviated from the DOT; and the ALJ failed to obtain an explanation or persuasive evidence to justify this deviation.

Plaintiff argues, and the court agrees, that the DOT states the hand packager job requires occasional balancing, which is inconsistent with the ALJ's finding that plaintiff is unable to balance. Pl.'s Mem. at 5; *see* DOT No. 920.587-018 (hand packager job requires occasional balancing, "up to 1/3 of the time"); AR at 13 (in assessing plaintiff's RFC, the ALJ found plaintiff could not balance). Defendant does not contest this requirement, but instead argues that "'up to 1/3' [of the time] includes 'none.'" Def.'s Mem. at 6. This argument is unpersuasive. On the contrary, "'[o]ccasionally' means occurring from very little up to one-third of the time." SSR 83-10, 1983 WL 31251, at *5. Thus, the least amount of balancing required in this position is "very little" not "none." Defendant further argues that "the deviation between the *DOT* job profile and Plaintiff's [RFC], if any, is so *de minimis* as to allow vocational expert testimony to explain that someone with Plaintiff's limitations could do hand packaging." Def.'s Mem. at 6. The court agrees that this would be proper, but the problem here is that the VE did not address this apparent discrepancy, nor does the record contain "persuasive evidence to

support the deviation." *See Massachi*, 486 F.3d at 1153. The ALJ therefore erred in accepting the VE's testimony.

But, contrary to plaintiff's contention, there is no inconsistency between the DOT and plaintiff's RFC precluding him from working around "hazardous" machinery. Pl.'s Mem. at 5. The hand packager job does not require work around "hazardous" machineries. *See* SSR 96-9p, 1996 WL 374185, at *9; DOT No. 920.587-018 ("Moving Mech. Parts: Not Present"; "Electric Shock: Not Present"; "High Exposed Places: Not Present"; "Radiation: Not Present"; "Explosives: Not Present"; and "Toxic Caustic Chem.: Not Present"); *Phonn v. Astrue*, 2010 WL 2850768, at *3 (C.D. Cal. July 20, 2010) (although the hand packager position requires operating a conveyor belt, such machinery is not a hazardous machine).

Although the ALJ erred at step five in finding that plaintiff could perform other work readily available in the national economy, this error was harmless in light of the ALJ's proper finding at step four that plaintiff could perform his past relevant work. *See supra* Part IV.A; 20 C.F.R. §§ 404.1560(b)(3) (If a claimant has the residual functional capacity to do his or her past relevant work, the ALJ will determine that the claimant is not disabled), 416.960(b)(3) (same); *Stout v. Comm'r*, 454 F.3d 1050, 1055 (9th Cir. 2006) (ALJ's error is harmless where such error is inconsequential to the ultimate non-disability determination); *see also Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) ("A decision of the ALJ will not be reversed for errors that are harmless."); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991) (harmless error rule applies to review of administrative decisions regarding disability). Accordingly, the court affirms the ALJ's decision based on his finding at step four.

V.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered AFFIRMING the decision of the Commissioner denying benefits, and dismissing this action with prejudice.

Dated: February 10, 2012

SHERI PYM
UNITED STATES MAGISTRATE JUDGE